

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

MILLNER APPELLANT ;
INFORMANT,

AND

RAITH RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF
NEW SOUTH WALES.

Criminal Law—Attempt—Offence created by retrospective statute—Liability for attempt during period of statute’s retrospective operation—Liability of person concerned in management of corporation—Attempt by corporation to commit offence—Crimes Act 1914-1937 (No. 12 of 1914—No. 5 of 1937), sec. 7—Defence Act 1903-1941 (No. 20 of 1903—No. 4 of 1941), secs. 73C, 73D, 73E—Defence Act 1941 (No. 4 of 1941), secs. 2, 3, 4.

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The *Defence Act* 1941, which was assented to on 4th April 1941, by secs. 3 and 4 amended the *Defence Act* 1903-1939 and by sec. 2 provided that secs. 3 and 4 should be deemed to have come into operation on 3rd September 1939.

Starke,
McTiernan and
Williams JJ.

Held that sec. 7 of the *Crimes Act* 1914-1937 applies to an attempt between the two dates above mentioned to commit what was only an offence by virtue of the retrospective operation of the amendments above referred to.

Secs. 73C and 73D of the *Defence Act* 1903-1941 create certain offences, and sec. 73E provides that where a person to whom sec. 73C or sec. 73D applies is a body corporate, the body and every person being a director or a person concerned in the management of the body shall, in respect of any act or fact specified in either of those sections, be guilty of an offence unless it or he proves certain matters of exculpation.

Held, by *Starke* and *Williams JJ.*, that the liability under sec. 73E of a director or person concerned in the management of a body corporate does not extend to cases where the body corporate is guilty only of an attempt to commit an offence against sec. 73C or sec. 73D.

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Two informations were laid on 5th November 1941, in the Court of Petty Sessions, Sydney, by Thomas George Millner against Jacob Lauder Raith.

In one of the informations it was alleged "that on or about the eleventh day of June 1940, Jacob Lauder Raith of Sydney . . . was a person concerned in the management of Abbco Bread Company Pty. Limited, a contractor and body corporate having its registered office at 681 Balmain Road, Leichhardt near Sydney . . . and that on or about the eleventh day of June 1940 the said Abbco Bread Company Pty. Limited did attempt to supply to the Commonwealth for use by the Defence Force an article of food, to wit, bread which was less in quantity than that specified in the order under which it was to be supplied, namely the order dated 10th June, 1940, for the delivery on 11th June 1940 of 14,090 lbs. of bread, whereby the said Jacob Lauder Raith is guilty of an offence against section 73c of the *Defence Act*, 1903-1941."

The other information was in similar terms except that after the words "to wit" the following words and figures appeared: "nine hundred and fourteen (914) loaves of bread each of which was less in quantity than that specified in the contract under which they were to be supplied whereby the said Jacob Lauder Raith is guilty of an offence against section 73c of the *Defence Act* 1903-1941."

Sec. 73c (1) of the *Defence Act* 1903-1939, so far as it is material, provides that any contractor, purveyor or other person, and any employee of a contractor, purveyor or other person, who fraudulently supplies to the Commonwealth or any officer of the Commonwealth for use by the Defence Force any article of food which is inferior in quality to or less in quantity than that specified in the contract, agreement or order under which it is to be supplied shall be guilty of an offence. The *Defence Act* 1903-1939, was amended by the *Defence Act* 1941, which was assented to on 4th April 1941. Sec. 3 of the *Defence Act* 1941 amended sec. 73c (1) of the principal Act by omitting the word "fraudulently" wherever occurring and by adding at the end of sub-sec. 1 the words "unless he proves that he supplied the article . . . without intent to defraud and that he neither knew nor had reasonable means of knowing that the article was so inferior or less in quantity."

Sec. 4 of the *Defence Act* 1941 added a new section, 73E, which, so far as material, is in the following terms: "Where a person to whom section seventy-three c or section seventy-three d of this Act applies is a body corporate, the body and every

person being a director or a person concerned in the management of the body shall, in respect of any act or fact specified in either of those sections; be guilty of an offence unless . . . (b) in the case of a person being a director or person concerned in the management of the body, he proves—(i) that the act or fact took place or existed without his knowledge; and (ii) that he did not have reasonable means of preventing the act or fact taking place or coming into existence.”

Sec. 2 of the *Defence Act* 1941 provides that secs. 3 and 4 of that Act shall be deemed to have come into operation on 3rd September 1939.

Sec. 7 of the *Crimes Act* 1914-1937 provides that any person who attempts to commit any offence against any law of the Commonwealth, whether passed before or after the commencement of the Act, shall be guilty of an offence and shall be punishable as if the attempted offence had been committed.

The Magistrate dismissed the informations on the ground that sec. 7 of the *Crimes Act* 1919-1937 did not have retrospective effect in respect of the offences charged.

From that decision the informant appealed by way of case stated to the High Court. The question for the opinion of the Court was whether the Magistrate's determination was erroneous in point of law.

Shand (with him Dr. *Louat*), for the appellant. The question considered in *Moss v. Donohoe* (1) and in *Moss and Phillips v. Donohoe* (2) involved an entirely different type of Act; in this case the Court is not concerned with questions of implied retrospectivity. By the operation of the *Defence Act* as amended the sections under which the appellant is proceeding came into operation, for all legal purposes, on 3rd September 1939. The alleged offences took place many months after that date. The provisions of sec. 7 of the *Crimes Act* 1914-1937 have a retrospective effect and conclude the matter in favour of the appellant.

A. R. Taylor, for the respondent. It was not until the amending Act No. 4 of 1941 was assented to on 4th April 1941 that it could be said that the relevant amendments were in force on 3rd September 1939. Sec. 7 of the *Crimes Act* 1914-1937 should not be given a retrospective operation. It operates only in respect of legislation as and when that legislation is enacted. On the simple construction of sec. 7 it provides for the future of that legislation, but not the past. It is a substantive position creating an offence, and, therefore, cannot

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(1) (1915) 20 C.L.R. 615.

(2) (1915) 20 C.L.R. 580.

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be given a retrospective operation (*Moss v. Donohoe* (1)). In *His Majesty's Advocate v. Mitchell* (2) the offence was committed after the statute had been enacted, therefore that decision is not applicable; the question of retrospectivity was not involved. Until 4th April 1941 there was not any subject matter to which the provisions of sec. 7 could be applied. On and after that date those provisions could only be applied to offences committed from that time onwards.

Shand, in reply.

Cur. adv. vult.

Sept. 3.

The following written judgments were delivered:—

STARKE J. Appeal by way of case stated pursuant to the appellate rules of this Court from a decision of the Court of Petty Sessions at Sydney, exercising Federal jurisdiction, holden before a Stipendiary Magistrate.

The respondent was charged on two informations, both informations being in the same form. They charged separate acts but were to this effect, that on or about 11th June 1940 the respondent was a person concerned in the management of Abbco Bread Co. Pty. Ltd., a contractor and body corporate having its registered office in New South Wales, and that on or about 11th June 1940 the said company did attempt to supply to the Commonwealth for use by the Defence Force an article of food, to wit, bread which was less in quantity than that specified in the contract or order under which it was to be supplied.

The charges were based upon sec. 73E, inserted in the *Defence Act* 1903-1939 by the *Defence Act* 1941 (No. 4 of 1941, sec. 4), sec. 73C of the *Defence Act* 1903-1939 as amended by the *Defence Act* 1941, sec. 3, and the *Crimes Act* 1914-1937, sec. 7. These Acts provide:—

Defence Act 1903-1941.—Sec. 73E: Where a person to whom secs. 73C or 73D of this Act applies is a body corporate, the body and every person being a director or a person concerned in the management of the body shall, in respect of any act or fact specified in either of those sections, be guilty of an offence, unless in the case of the body, it proves that the act or fact took place or existed without the knowledge of any director, or of any person concerned in the management, of the body; and that no such director or person concerned had reasonable means of preventing the act or fact taking place or coming into existence; or in the case of a person being a director or person concerned in the management of

(1) (1915) 20 C.L.R., at pp. 620, 621.

(2) (1915) 52 Sc. L.R. 273.

the body, he proves that the act or fact took place or existed without his knowledge; and that he did not have reasonable means of preventing the act or fact taking place or coming into existence. Sec. 73c: Any contractor . . . or other person and any employee of a contractor . . . or other person who supplies to the Commonwealth . . . for use by the Defence Force any article of food which is . . . less in quantity than that specified in the contract, agreement or order under which it is to be supplied . . . shall be guilty of an offence, unless he proves that he supplied the article . . . without intent to defraud and that he neither knew nor had reasonable means of knowing that the article was . . . less in quantity . . .

And sec. 2 of the *Defence Act* 1941, which received the Royal Assent on 4th April 1941, provided that secs. 3 and 4 (that is, the amendment to sec. 73c and the added sec. 73E) should be deemed to have come into operation on 3rd September 1939 which, it may be noted, is the date of the outbreak of the present war with Germany.

Crimes Act 1914-1937.—Sec. 7: “Any person who attempts to commit any offence against any law of the Commonwealth whether passed before or after the commencement of this Act shall be guilty of an offence”

The informations do not charge that the respondent supplied or attempted to supply any article of food less in quantity than that specified in the contract or order under which it was to be supplied but that being a person concerned in the management of a body corporate that body did attempt to supply to the Commonwealth for use by the Defence Force an article of food less in quantity than that specified in the contract or order under which it was to be supplied.

The provisions of sec. 73E are complementary to secs. 73c and 73D. They make a director or person concerned in the management of a body corporate responsible as a principal for any act or fact specified in those sections merely because of his relation to the body corporate. And they also make special provisions for the exculpation of the body corporate and any director or person concerned in the management of the body corporate. But is he also a person who, in the words of the *Crimes Act* 1914-1937, sec. 7, attempts to commit an offence against a law of the Commonwealth? He will be so if he participates in acts which constitute an attempt to commit an offence. But the section does not make him responsible merely because of his relation to a body corporate as a director or person concerned in its management. It requires something active, some participation in the act which constitutes the attempt. The *Defence Act* 1903-1941, sec. 73E, deals only with the principal offence and not with attempts to commit it.

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In my opinion the informations do not disclose any offence under sec. 7 of the *Crimes Act*. They merely charge that the respondent was concerned in the management of a company which attempted to commit an offence. They therefore disclose no offence under sec. 7 and might for that reason have been dismissed.

The case was argued before the Stipendiary Magistrate and before this Court on the assumption that the informations charged offences under sec. 7 of the *Crimes Act* 1914-1937, but it was contended that an attempt to commit the acts charged in the present case was not unlawful on 11th June 1940. The effect of sec. 2 of the *Defence Act* 1941, however, is to make the sections therein mentioned operative and effective on and from 3rd September 1939. A law of the Commonwealth therefore prescribed, in effect, that certain acts should be deemed offences on and from 3rd September 1939. The *Crimes Act* 1914-1937, sec. 7, picks up and explicitly operates on that provision and makes an attempt to commit any of those acts an offence.

The construction given by the stipendiary magistrate to the *Crimes Act* 1914-1937, sec. 7, and the *Defence Act* 1941, sec. 2, cannot be sustained, but his decision, I think, might be sustained for the reasons above stated.

The question stated should be answered in the negative and the order of the Stipendiary Magistrate set aside. The matter is remitted to him to do as shall appear just consistently with this decision.

MCTIERNAN J. In my opinion the magistrate was in error in dismissing the informations on the ground, which he took, namely, that sec. 7 of the *Crimes Act* 1914-1937 could apply only to an attempt to commit an offence against the *Defence Act* 1941 after the Act received the Royal Assent. Sec. 7 applies to any attempt to do an act which fell within the retrospective operation of the *Defence Act* 1941 and accordingly became an offence against the law of the Commonwealth. The question whether sec. 7 of the *Crimes Act* could apply in this way is the only question that was argued before this Court. The magistrate decided it incorrectly.

The appeal should be allowed and the matter remitted to the Court of Petty Sessions.

WILLIAMS J. On 5th November 1941 two informations were laid before a justice at the Central Police Court, Sydney, each stating that Jacob Lauder Raith was a person concerned in the management of Abbeo Bread Co. Pty. Ltd., a contractor and body corporate having its registered office at 681 Balmain Road, Leichhardt, near Sydney, in the State of New South Wales, and that on or about 11th

June 1940 this company attempted to supply to the Commonwealth for use by the Defence Force bread, which one information alleged to be less in quantity than that specified in the order under which it was to be supplied, namely, the order dated 10th June 1940 for the delivery on 11th June 1940 of 14,090 pounds of bread whereby the said Jacob Lauder Raith was guilty of an offence against sec. 73c of the *Defence Act* 1903-1941, while the other information alleged, as to 914 loaves of this bread, that each loaf was less in quantity than that specified in the contract under which they were to be supplied whereby the said Jacob Lauder Raith was guilty of an offence against this section.

Sec. 73c (1) of the *Defence Act* 1903-1939 (so far as material) provides that any contractor, purveyor or other person, and any employee of a contractor, purveyor or other person, who fraudulently supplies to the Commonwealth or any officer of the Commonwealth for use by the Defence Force any article of food which is inferior in quality to or less in quantity than that specified in the contract, agreement or order under which it is to be supplied shall be guilty of an offence. The *Defence Act* 1903-1939 was amended by the *Defence Act*, No. 4 of 1941, which was assented to on 4th April 1941. Sec. 3 of the *Defence Act* 1941 amended sec. 73c (1) of the principal Act by omitting the word "fraudulently" wherever occurring and by adding at the end of sub-sec. 1 the words "unless he proves that he supplied the article . . . without intent to defraud and that he neither knew nor had reasonable means of knowing that the article was so inferior or less in quantity." Sec. 4 of the *Defence Act* 1941 added a new section, 73E, which, so far as material, is in the following terms:—"Where a person to whom section seventy-three c or section seventy-three d of this Act applies is a body corporate, the body and every person being a director or a person concerned in the management of the body shall, in respect of any act or fact specified in either of those sections, be guilty of an offence unless— . . . (b) in the case of a person being a director or person concerned in the management of the body, he proves—(i) that the act or fact took place or existed without his knowledge; and (ii) that he did not have reasonable means of preventing the act or fact taking place or coming into existence." Sec. 2 of the *Defence Act* 1941 provides that secs. 3 and 4 of that Act shall be deemed to have come into operation on 3rd September 1939, so that sec. 73c (1) of the principal Act, as amended by sec. 3 of the *Defence Act* 1941 and sec. 73E of the latter Act, by clear and explicit language, are made to operate retrospectively from 3rd September 1939.

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Any employee, therefore, of a contractor who supplied to the Commonwealth bread for use by the Defence Force inferior in quality to or less in quantity than that specified in the order under which it was to be supplied at any time after 3rd September 1939 and could not show he had done so without intent to defraud, &c., would be guilty of an offence under sec. 73c (1). He would attempt to commit this offence whenever he attempted to supply the Commonwealth with such bread after this date. Sec. 7 of the Commonwealth *Crimes Act* 1914-1915 (now the *Crimes Act* 1914-1937), as amended by the *Crimes Act*, No. 9 of 1926, sec. 6, provides that any person who attempts to commit any offence against any law of the Commonwealth, whether passed before or after the commencement of the Act, shall be guilty of an offence and shall be punishable as if the attempted offence had been committed. So that any attempt by Raith, as the general manager of Abbco Bread Co. Pty. Ltd., on 11th June 1940, to supply the Commonwealth with bread inferior in quality to or less in quantity than that ordered would be conduct which was on that date an attempt to commit an offence against sec. 73c (1) of the *Defence Act* as amended. It is true he could not be prosecuted for the offence until after 4th April 1941, but he could attempt to commit it at any time after 3rd September 1939.

The case before us was argued on the basis that the charge against Raith fell within the provisions of sec. 73c (1), but the informations do not charge that Raith himself attempted to supply such bread to the Commonwealth, but that the company attempted to do so and that Raith was a person concerned in the management of the company. It is therefore sought to make Raith liable on the basis that an attempt by the company to supply such bread would be an offence under sec. 7 of the *Crimes Act*, for which Raith would be liable under the provisions of sec. 73E as a person concerned in the management of the company, unless he could prove the attempt by the company took place without his knowledge and that he did not have reasonable means of preventing the attempt taking place. I agree that sec. 73E only makes the body corporate and directors and persons concerned in the management of the body liable where, in the words of the section, an act or fact specified in sec. 73c takes place. Raith should therefore have been charged with an attempt to commit the offence defined by sec. 73c (1). As evidence was given of such an attempt (See *R. v. Woods* (1); *Halsbury's Laws of England*, 2nd ed., vol. 9, pp. 40-45), the matter should be remitted to the magistrate to enable him to consider whether the prosecution should not be allowed to charge Raith orally with this offence

(*Ex parte Williams* ; *Re Singleton* (1) ; *Ex parte Lovell* ; *Re Buckley* (2) ; *R. v. Mulroy* (3)).

At the hearing the magistrate dismissed the informations on the ground that no offence had been proved. He decided that sec. 7 of the *Crimes Act* could only operate with respect to attempts to commit an offence under sec. 73c (1) made after 4th April 1941 ; and that to seek to apply the section of the *Crimes Act* to events which happened in June 1940, would be to give it a retrospective operation. A statute must, of course, be construed *prima facie* as being prospective in its operation and so as not to interfere with existing rights, unless it contains express words or there is a necessary implication to that effect. But the scope of sec. 7 includes attempts to commit any offence against any law of the Commonwealth passed after the commencement of the *Crimes Act*. It is possible for the Commonwealth Parliament, as it has done in the case of the *Defence Act* 1941, to pass an Act which is deemed to be operative from an antecedent date (*R. v. Kidman* (4)). Any conduct made an offence by such an Act becomes unlawful from this antecedent date in exactly the same way as if the Act had been passed on that date. To attempt such conduct on a subsequent date must be an attempt to commit an offence against a law of the Commonwealth.

On 18th February 1942, at the request of the prosecutor, the magistrate stated a case under the provisions of sec. 101 of the *Justices Act* 1902 (N.S.W.) for the opinion of this Court asking the question whether his decision was erroneous in point of law. In so far as the magistrate considered that sec. 7 of the *Crimes Act* could only apply to attempts to commit the offence referred to in sec. 73c (1) of the *Defence Act* as amended made after 4th April 1941, I consider that he was in error. But I agree that Raith could not be convicted of an offence under sec. 7 of the *Crimes Act* upon the present informations.

The question asked should therefore be answered in the negative. But for the reasons already mentioned the matter should be remitted to the magistrate.

Question answered in the negative. Matter remitted to the magistrate.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *R. D. Meagher, Sproule & Co.*

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(1) (1928) 28 S.R. (N.S.W.) 616 ; 45 W.N. 189.

(2) (1938) 38 S.R. (N.S.W.) 153, at p. 173.

(3) (1940) 57 W.N. (N.S.W.) 159.

(4) (1915) 20 C.L.R. 425.